THE YALE LAW JOURNAL

Subscription price $4.50 per year *80 cents per number*

Canadian subscription price $5.00 per year; Foreign, $5.25 per year

Yale Law Journal Company, Inc., Box 401A, Yale Station, New Haven, Conn.

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AN INTRANSIGENCY of purpose and keenness of analysis characterized all that Professor Walter Nelles did. He gave his best to the law, first as a participant in the struggle to protect civil liberties, later as a scholar in the field of legal history. But while we respected him for his ability, we loved him for his goodness and his understanding. In his death we mourn the loss of a friend.

BANKRUPTCY REFORM AND THE CHANDLER BILL

THE NOTORIOUS paucity of dividends ordinarily distributed to creditors upon liquidation in bankruptcy[1] has provoked wide comment and a growing movement for reform. It has long been felt that the Bankruptcy Act[2] has

1. The dividends distributed to general creditors have long averaged less than 8% of liabilities. See REPS. ATT'Y GEN. (1926–1935).

2. For the best short discussion of bankruptcy and insolvency in all their aspects, see Douglas, *Bankruptcy* (1930) 2 ENCYC. SOC. SCIENCES 449. On bankruptcy history and comparative legislation, see references cited *id.* at 454. See in addition, STRENGTH-

failed to minimize the total losses suffered by the general creditor body,[3] although it may have succeeded in providing adequate relief for honest debtors.[4] Numerous investigations and reports, instituted to discover the deficiencies of bankruptcy, culminated in the preparation of the Hastings-Michener Bill of 1932, which embodied rather drastic revisions of the existing bankruptcy law.[5] Although that bill was buried in committee, it furnished the impetus for the formation of the National Bankruptcy Conference, an organization composed principally of lawyers, referees, and credit men, which constituted itself to prepare a substitute measure.[6] The product of the Conference, incorporating many major and minor amendments to the Bankruptcy Act, was finally introduced as the Chandler Bill in the last session of Congress and reintroduced in substantially similar form in the current session.[7]

ENING OF PROCEDURE IN THE JUDICIAL SYSTEM, SEN. DOC. No. 65, 72d Cong., 1st Sess. (1932) (report of the Attorney General on Bankruptcy Law and Practice), at 49, hereinafter cited as STRENGTHENING OF PROCEDURE; DONOVAN, ADMINISTRATION OF BANKRUPT ESTATES (1931) 146 (Canada), 169 (England); WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935); Brown, *Comparative Legislation in Bankruptcy* (1900) 2 J. SOC. COMP. LEG. 251; Levinthal, *The Early History of English Bankruptcy* (1919) 67 U. OF PA. L. REV. 1. For a brief description of the bankruptcy systems of twenty countries, see (1931) 5 J. N. A. REF. BANKR. *passim*.

3. This purpose includes within its scope equality of distribution. See Glenn, *A Study in the Development of Creditors' Rights* (1914) 14 COL. L. REV. 279, 369, 491; McLaughlin, *Amendment of the Bankruptcy Act* (1927) 40 HARV. L. REV. 341, 358. It is by no means certain, however, that pro rata distribution on a percentage basis is desirable. Sturges, *A Proposed State Collection Act* (1934) 43 YALE L. J. 1055; note 203, *infra; cf.* Levinthal, *The Early History of Bankruptcy Law* (1918) 66 U. OF PA. L. REV. 223, 234.

4. STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at xi. It is now generally conceded that the bankruptcy law serves a vital function although repeal measures are persistently introduced. Rogers, *The Bankruptcy Act—And Suggested Changes* (1925) 2 N. Y. U. L. Q. REV. 118, 126; Wolfe, *The Bankruptcy Law and Its Economic Necessity* (1930) 4 TEMP. L. Q. 218. Dissatisfaction with bankruptcy statutes is by no means localized. See (1936) 5 So. AFR. L. T. 128 (new South African statute).

5. The Hastings-Michener Bill, S. 3866, H. R. 9968, 72d Cong., 1st Sess. (1932), is exhaustively analyzed in STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 68. The most important investigations were those conducted by the Solicitor General [STRENGTHENING OF PROCEDURE, *supra*], by Colonel William J. Donovan [DONOVAN, ADMINISTRATION OF BANKRUPT ESTATES (1931)] and by the Yale Law School and the Department of Commerce. For a list of earlier investigations and reports, see Clark, *Reform in Bankruptcy Administration* (1930) 43 HARV. L. REV. 1188, 1191, n. 9.

6. The history of the Conference is outlined in McLaughlin, *Aspects of the Chandler Bill to Amend the Bankruptcy Act* (1937) 4 U. OF CHI. L. REV. 369; Committee Print, H. R. 12889, 74th Cong. 2d Sess. (1936), preface. The experience of the Conference demonstrates that a permanent organization is necessary to foster thoroughgoing reform. See Clark, *supra* note 5, at 1215.

7. H. R. 6439, 75th Cong., 1st Sess. (1937). After four years work, the Bill was introduced in the 74th Cong., 2d Sess. (1936) as H. R. 10382 and later as H. R. 12889. For the published drafts and suggestions on which the first draft was based, see Hastings-Michener Bill, *supra* note 5; Hunt, *Improvement of Bankruptcy Administration* (1931–

The Chandler Bill attempts to decrease creditor's losses in various ways: by preventing failures initially; by shortening the critical period—that period of asset dissipation and liability accumulation between the time a debtor first experiences trouble in meeting his obligations and the time he invokes the aid of some part of the machinery society has provided for resolving his difficulties—either by making it easier for creditors to force a debtor into bankruptcy, or by offering a debtor positive inducements to avail himself of some voluntary proceeding;[8] by realizing more from a debtor's assets through sale of assets brought into bankruptcy at highest prices, recovery of those not brought into bankruptcy and resort to a debtor's future earnings; and by securing a more efficient and economical administrative and liquidating machinery.

The proposals made by the Chandler Bill may roughly be divided into two classes: those which set up or perfect devices, such as compositions and extensions, assignments, and amortization by wage earners, designed to obviate liquidation through standard bankruptcy proceedings, and those which aim to increase dividends upon liquidation in bankruptcy. This Comment will confine itself to an examination of some of the more important of these proposals,[9] considering how well they are designed to achieve their usual objective

32) 8 AM. BANKR. REV. 25, 57, 95, 124, 155, 371; Hunt, *National Bankruptcy Legislation—Past, Present and Future* (1933) 38 COMM. L. J. 630; McLaughlin, *supra* note 3, at 341, 583; (1932) 8 AM. BANKR. REV. 388 (Weinstein draft); (1932) 7 J. N. A. REF. BANKR. 3 (referees' proposals).

8. Fürth, *The Critical Period Before Bankruptcy* (1932) 41 YALE L. J. 853; Legis. (1933) 33 COL. L. REV. 704, 705, n. 6. The existence of the critical period is substantiated by the fact that dividends in involuntary cases are higher than in voluntary cases. REP. ATT'Y GEN. (1932) 247; REP. ATT'Y GEN (1933) 148. This discrepancy may be explained on the ground that all wage earner proceedings are voluntary, and dividends in wage earner proceedings are notoriously lower than in other cases. The simplest method of facilitating subjection of debtors to involuntary bankruptcy is to adopt the equity definition of insolvency—inability to meet debts as they mature. Even if this measure were politically practicable, its adoption might result in forcing virtually solvent debtors into bankruptcy, particularly in times of depression. For an analysis of financial statements and ratios to assist in a determination of business condition, see FITZPATRICK, SYMPTOMS OF INDUSTRIAL FAILURE (1931).

9. It will not be possible to consider in this Comment various major proposals made in the bill: § 5 (revised partnership section); § 12-II (corporate reorganizations), somewhat similar provisions in H. R. 12889 discussed in Gerdes, *Section 77B, The Chandler Bill and Other Proposed Revisions* (1937) 35 MICH. L. REV. 361; § 12-III (real property arrangements), discussed in Adams, *Practice and Procedure under Section 74* (1936) 11 J. N. A. REF. BANKR. 45; old § 75 allowed to expire (agricultural compositions—new Frazier-Lemke Act); repeal of old § 76 recommended. Various important provisions relating to preferences, fraudulent conveyances and kindred topics are discussed in McLaughlin, *loc. cit. supra* note 6. See page 1204 *infra*, for a consideration of some preference amendments. Nor can the valuable improvements in draftsmanship be here considered. See McLaughlin, *supra* at 377, n. 8. The excellent notes in the Committee Print, *supra* note 6, should also be consulted.

of increasing dividends to creditors, and whether the social cost of achieving that objective is too great.

Substitutes for Bankruptcy Liquidation

Compositions and Extensions. Composition and extension agreements, by the terms of which a debtor agrees in return for a release to pay his creditors a certain percentage of their claims, are used primarily but not exclusively by the small business man as substitutes for bankruptcy liquidation. Theoretically a composition provides for immediate payment of a reduced amount and an extension for deferred but full payment; actually, however, most agreements combine features of both.[10] The initial cash payment often required by these settlements is usually financed by a loan or a sale of liquid assets. A debtor enters into such an agreement in order to continue his business freed from the stigma of bankruptcy. Creditors agree to these settlements even though debtor retention of some assets is involved because they hope to obtain higher dividends by avoiding a costly and destructive liquidation and at the same time keep a customer in business.[11]

Since common law compositions bind only assenting creditors, statutory sanction was given to settlements of this sort early in the nineteenth century.[12] The legislative evolution of composition procedure in the United States culminated in Section 12 of the Bankruptcy Act, which, as amended, provides that a petition may be filed before or after adjudication in a pending bankruptcy proceeding and that agreements approved by a majority of creditors and confirmed by the court are binding on all unsecured creditors. But Section 12 has not been employed extensively primarily because of the cumbersome procedure it sets up.[13] An unsavory reputation has attached to compositions, moreover, as a result of the invocation of the dilatory procedure by some debtors to avoid examination or to delay bankruptcy proceedings and of the common practice of obtaining creditor approval by purchasing bona fide

10. Legis. (1933) 33 Col. L. Rev. 704, 705 n. 9.

11. Beckman, Credits and Collections in Theory and Practice (1924) 383 But *cf. Joint Hearings before Subcommittees of the Committees on the Judiciary on S. 3866*, 72d Cong., 1st Sess. (1932) 729. Avoidance of liquidation is said to be particularly important in depression time. Kinnane, *Some Aspects of Section 74 of the Bankruptcy Act* (1934) 9 Notre Dame Lawy. 291. Scaling down of debts in time of depression allows repayment of "real" value. McKeown and Langellutig, Federal Debtor Relief Laws (1935) iii.

12. For a history of the development of compositions, see Committee Print, *op. cit. supra* note 6, at 36. On comparative composition legislation, see note 2, *supra;* Dunscombe, *Preventive Compositions or Compositions That Will Forestall Bankruptcy* (1916) 20 Case and Comment 594, 596.

13. The cumbersome machinery is vividly described in Donovan, *op. cit. supra* note 2, at 24, 114. Compositions represent only 1½% of all cases under the act and only 5% of total cases of merchants and manufacturers. Strengthening of Procedure, *op. cit. supra* note 2, at 208. One-third of all compositions are in the New York City vicinity [Donovan, *supra* at 217], and the rest are concentrated in a few areas.

claims at a discount, manufacturing fraudulent claims or buying off objecting creditors.[14] And debtors occasionally find it unnecessary to invoke Section 12, since they are usually able to effect what is virtually a composition by obtaining court approval to a purchase of their property at a private bankruptcy sale.

In the hope of shortening the critical period and of preventing a greater number of liquidations, Section 74 of the Bankruptcy Act, passed in 1933, attempted to widen the scope of relief available to individuals under composition procedure.[15] An attempt was made to minimize the stigma of bankruptcy compositions by permitting debtors, insolvent or unable to meet their debts as they matured, to submit a plan of settlement in an original petition independent of any bankruptcy proceeding, as well as an answer in a pending proceeding before adjudication, and by making the provisions for granting a stay of liquidation or adjudication more liberal. The permissible scope of a plan was broadened and the extension of secured claims with creditor and court approval was sanctioned. A later amendment appears to have made creditor approval of any extension agreement unnecessary.[16] Protection against attachment of a debtor's property by non-assenting creditors during the pendency of extension agreements was afforded by providing for retention of jurisdiction by the court after confirmation of a plan. To expedite procedure Section 74 gave the referee original jurisdiction over proceedings and the court exclusive jurisdiction over the debtor and his property wherever located. Although it is contended that the section has been of no practical value to debtors, it has been used without handicap and with positive benefits in a number of ordinary composition cases; it has made possible for the first time under the Bankruptcy Act the working out of wage earner amortization plans and real property reorganizations by individuals; it has even, some have suggested, revitalized proceedings under Section 12.[17]

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14. See DONOVAN, *op. cit. supra* note 2, at 114.

15. Discussions of § 74 are cited in Comment (1934) 43 YALE L. J. 1285, n. 3; see also MCKEOWN AND LANGELLUTIG, *loc. cit. supra* note 11; (1933) 18 IOWA L. REV. 537. Section 74 was intended to supersede § 12. The clause repealing § 12 was deleted in a last minute legislative flurry because corporations were inadvertently excluded from the benefits of § 74.

16. 48 STAT. 922, 11 U. S. C. § 202(e) (1934). While the proponents of § 74 believed that they were providing for extension agreements for the first time, such agreements were consummated under § 12. Legis. (1933) 33 COL. L. REV. 704, 705. But *cf.* Garrison, *The New Bankruptcy Amendments: Some Problems of Construction* (1933) 8 WIS. L. REV. 289, 295. Creditors will generally consent more readily to extension agreements than to composition agreements. Legis. (1933) 33 COL. L. REV. 704, 718.

17. Comment, *A Survey of Sections 74 and 75 of the Bankruptcy Act in Actual Operation* (1934) 43 YALE L. J. 1285; (1935) 10 J. N. A. REF. BANKR. 66. In the Southern District of New York there have been 171 cases since the enactment of § 74 in March, 1933. Communication to the YALE LAW JOURNAL from Referee Peter B. Olney, Jr., referee in the Southern District of New York, March 2, 1937. Pessimistic predictions that § 74 was unsound, ambiguous, unworkable, and unnecessary seem to have been grounded on an overstrict interpretation of a poorly drafted statute.

The Arrangement Subsection of the Chandler Bill, which supersedes Sections 12 and 74, carries still further the objectives of the latter Section. Both corporations and individuals are allowed to propose a plan after as well as before adjudication.[18] The scope of a plan is extended to include not only those provisions allowed by Section 74, but any other appropriate terms, including those commonly used in out-of-court extension and reorganization agreements. A plan may call for any consideration and may provide for division of unsecured creditors into classes; rejection of executory contracts, including leases; continuation of the debtor's business with or without creditor or other supervision; termination of an extension under specified conditions; allowance of priority to debts incurred during the pendency of an arrangement; retention of jurisdiction by the court; and any other appropriate terms consistent with the Subsection. A proposal, on the other hand, may not affect secured claims.[19] The bill attempts to preserve the interests of creditors by re-enacting, in effect, Section 74m, which required an assignee or court official whenever appointed to account;[20] by vesting the officers of the court with the usual bankruptcy powers;[21] by tolling Statutes of Limitation and the four months' period for the running of preferences;[22] and by speeding up proceedings to some extent.[23] Upon approval by a majority of creditors and deposit of consideration, priority claims, and costs, the court is to confirm an arrangement if satisfied that it is equitable, feasible and for the best interests of creditors; court approval is unnecessary when all creditors have accepted.[24] A stay of adjudication is to be granted only when security has been posted against diminution,[25] and the debtor is to be examined in every case.[26] If a plan fails of creditor acceptance, court confirmation, or final consummation, the court is given power to adjudicate the debtor, although the court may extend for cause the time of payment to cure a default.[27]

The Arrangement Subsection should be of value to both corporate and individual debtors. Some of the smaller corporations now seeking relief under Section 77B may be induced to utilize the simpler machinery proposed by this Subsection, especially since a plan may provide for the formation of a new company and the issuance of new securities. Compositions and extensions by individuals, besides being made available to those who already have

18. § 12-Ia(2)(b); § 12-Ib(1).
19. § 12-Ic.
20. § 2a(21).
21. § 12-If(1)(b).
22. § 12-Ie(11).
23. *E.g.*, § 12-Ie(2) (assent to modified proposal); 12-Id(3)(e)(3) (time for filing application for confirmation).
24. § 12-Ie; § 12-Id(3)(e)(2). Deposit of priority claims may be waived. § 12-Id (3)(e)(2).
25. § 12-Ib(3). Where an original petition is filed, a requirement of security rests within the discretion of the court.
26. § 12-Id(3)(c).
27. § 12-Ie(7),(8).

been adjudicated bankrupts, will probably operate more effectively, although many of the "new" devices proposed by the bill have doubtless been previously employed. A division of creditors into classes will make possible, for example, payment to a bank of a higher percentage of an old claim than is paid to merchandise creditors, in order to obtain a loan to finance the composition. And new credit may be more easily secured during the operation of a business under an extension agreement by granting priority to new debts.[28]

The usefulness of the Section is restricted, however, by the omission of secured claims from its purview. While it is not constitutionally possible to scale down secured claims, it is permissible to extend them within certain limits.[29] Even if the Arrangement Subsection empowered a majority of creditors to bind secured creditors to an extension agreement, little assistance would be given debtors in retaining their homes or farms, since a secured creditor, whose claim often comprises more than half of a debtor's total obligations, will be able to block a proposal affecting his rights. To provide for such cases, it is necessary to retain the provisions of Section 74 vesting courts with power to confirm extension agreements without creditor consent.[30] And if unsecured creditors are to be granted full relief, power to confirm all proposals affecting their rights without creditor approval should be granted to the court. On the other hand, if minority creditors and debtors forced by creditor pressure to accept unconscionable terms are to be protected, it seems wise to ignore suggestions that court confirmation be dispensed with where a large proportion of creditors approve an agreement.[31]

In several other respects the Arrangement Subsection is not designed to attract debtors. The requirement that costs and priority claims be immediately paid or deposited may often impose a prohibitive burden on a small business man seeking an extension.[32] Nor will debtors be induced to come to terms early in the hope of being spared from the stigma of bankruptcy by the provisions allowing the court to adjudicate a debtor when a plan fails

28. It is specifically provided also that confirmation of a composition operates as a discharge. § 12-Ie(6). See note (1924) 31 A. L. R. 439.

29. Compare Wright v. Vinton Branch of Mountain Trust Bank of Roanoke, 57 Sup. Ct. 556 (1937), with Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555 (1935). See also Comment (1935) 44 YALE L. J. 651; WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935) 9.

30. Comment (1934) 43 YALE L. J. 1285, 1292. A proposal writing in the amendments of § 75(s) to § 74 was passed by the Senate but not by the House. (1936) 11 J. N. A. REF. BANKR. 7.

31. See YEARBOOK (1924) (Ass'n of Bar of City of N. Y.) 282. But see (1914) 48 IR. L. T. 81. Such a provision would not limit the utility of the Arrangement Subsection because court consent is withheld only in unusual circumstances.

32. For possible procedural amendments, see *Joint Hearings, supra* note 11, at 524. And retention of jurisdiction should have been made mandatory rather than permissive in order to insure against attachment during the pendency of an extension arrangement.

of acceptance, confirmation, or consummation; making the posting of security against diminution a condition precedent to the granting of a stay of adjudication;[33] and requiring an examination in every case.[34] The privileges of the Section are justifiably extended to those who have already been adjudicated bankrupt, although the stigma of arrangement proceedings may thereby be infinitesimally increased.[35]

While the Chandler Bill is an improvement over Section 74 in many respects, no proposal of its general character can lead to any great increase in the use of bankruptcy compositions. Compositions might be encouraged more successfully by strengthening the position of common law settlements, generally conceded to be less formal, less expensive, and less stigmatized. The Chandler Bill makes no efforts in that direction, other than to allow the use of consents obtained prior to the institution of court proceedings.[36] The Bankruptcy Act might well be amended to declare that a common law settlement accepted by a majority of creditors operate to bind all creditors, provided that upon the petition of any creditor within a specified period after notification of the consummation of the agreement, the bankruptcy court would have the power to set the agreement aside for cause.[37] A supplementary provision would allow a common law composition to supplant an attachment or other collection proceeding.[38] It also would be provided that subsequently discovered preferences are recoverable and payable half to the discovering creditor and pro rata to other creditors.[39] These provisions would encourage debtors to seek common law settlements and would allow wider use of them without depriving minority creditors of protection.

It may be questioned, however, whether it is sound policy to foster the use of compositions. Most in-court and many out-of-court compositions and extensions probably afford no more than transient relief. Even in the unusual case when relief is sought at an early stage of insolvency, the immediate payment of cash required in many compositions is likely to make ultimate

33. See Legis. (1933) 33 COL. L. REV. 704, n. 3, n. 5; Kinnane, *supra* note 11, at 311.

34. Examination could be left to the discretion of the referee, or made mandatory on the petition of 10% of creditors. See DONOVAN, *op. cit. supra* note 2, at 156 (Canadian provision).

35. Section 74 was confined to unadjudicated debtors for this reason. See Legis. (1933) 33 COL. L. REV. 704, 711. The Arrangement Subsection seeks to attract debtors at too high a price when it seemingly allows them to bargain away their exemptions. But see Comment (1933) 18 ST. LOUIS L. REV. 324, 328. Unlike § 74 the Arrangement Section makes no specific provision for the setting aside of exemptions. The Amortization Section of the bill contains a specific provision to that effect. § 12-IVf(4).

36. § 12-Id(3)(d).

37. A somewhat similar proposal is made in Comment (1933) 11 N. C. L. REV. 310. Composition statutes in Europe originally merely legalized out-of-court settlements. Holm-Nielsen, *An European View of the American Bankruptcy Act of March, 1933* (1933) 9 AM. BANKR. REV. 310, 311.

38. *Cf.* Sturges, *A Proposed State Collection Act* (1934) 43 YALE L. J. 1055.

39. *Cf.* Sturges, *id.* at 1079; Comment (1933) 11 N. C. L. REV. 310.

failure a certainty by draining the business of working capital.[40] If this difficulty can be overcome, an agreement is not likely to eliminate those varied factors of inefficiency which usually make for business failure, except in the rare case where competent creditor supervision is provided for.[41] And it is of doubtful wisdom to facilitate the operation of a process which assists inefficient units to remain in business.[42]

Assignments for the Benefit of Creditors. Because of dissatisfaction with bankruptcy machinery, commercial debtors have often effected liquidations and carried out compositions and extensions by turning over their assets to assignees.[43] Although all creditors are barred from attaching property in the hands of an assignee,[44] fraudulent assignments are controlled by allowing three non-consenting creditors to petition an assigning debtor into involuntary bankruptcy.[45] Assignments are otherwise unchecked except by regulatory statutes in some states.[46] These statutes usually provide for supervision over the assignee, recovery of preferences and examination of the debtor, but it is claimed that they are so cumbersome in their operation and so poorly enforced that they are of little service in preserving the rights of creditors.[47]

40. Comment (1934) 43 YALE L. J., 1285, 1292. Extension agreements are also likely to fail unless substantial additions can be made to capital. *Joint Hearings, supra* note 11, at 868.

41. See page 1186 *infra*. The Bill deletes the provision that a plan must make for the financial rehabilitation of the debtor before the court will confirm it, but bestowal of court approval will hardly be influenced by this omission.

42. See Comment (1934) 43 YALE L. J. 1285, 1291. It has been suggested that a staff of experts be set up to examine the social and economic justification for the continuation of a particular business and to proceed with liquidation or rehabilitation accordingly. See Cover, *Business and Personal Failure and Readjustment in Chicago* (1933) 3 U. OF CHI. J. OF BUS. No. 3, 106. The Act itself recognizes that some businesses may be socially more necessary than others when it exempts certain types of corporations, such as railroads, from its operation.

43. Sturges, *Commercial Arbitration or Court Application of Common Law Rules of Marketing?* (1925) 34 YALE L. J. 480. It is estimated that assignments are used one-half as often as bankruptcy in the United States. STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 69.

44. See Comment (1932) 41 YALE L. J. 603, 608.

45. § 3a(5) Bankruptcy Act. For discussions of what constitutes a "general assignment," and of methods of avoiding the statutory definition, see Comment (1932) 41 YALE L. J. 1056; Legis. (1933) 33 COL. L. REV. 705, n. 8; *Joint Hearings, supra* note 11, at 644. That assignments are often made for fraudulent purposes, see *id.* at 704, 822, 827.

46. For a classification of the provisions of state assignment statutes, see Legis. (1933) 20 VA. L. REV. 222.

47. STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 71; see also (1937) 15 N. C. L. REV. 267 (weakness of preference provisions of state statute). "When the assignment is made at common law, and not pursuant to statute, it may provide a cheaper and more expeditious method than bankruptcy, but my experience, under the New York Assignment Statute, is that the statutory proceeding is more cumbersome and expensive and does not provide as complete and adequate safeguards as though it were conducted under the jurisdiction of the Bankruptcy Act." Communication to the

And since state statutes generally do not provide for the setting aside of exemptions and can not grant a discharge, the debtor's rights are not adequately protected, for an assignment only releases him from claims held by consenting creditors.[48]

Honest assignees and assignments operate at a great disadvantage. Assignees are constantly plagued by nuisance creditors or unscrupulous attorneys who threaten to institute bankruptcy proceedings if they are not bought off. Indeed, assignees, unequipped with statutory powers, may themselves be forced to seek bankruptcy.[49] And a penniless debtor who wishes to obtain a discharge from all his debts may be compelled to avail himself of the very bankruptcy proceedings he had attempted to avoid.[50]

Despite these handicaps a number of assignments have operated successfully. Particularly significant are those conducted by the non-profit making adjustment bureaus affiliated with the National Association of Credit Men.[51] These bureaus handle—sometimes with active creditor assistance—assignments aimed at liquidation of a debtor's estate or the negotiation of composition agreements.[52] Not infrequently the bureau will consummate an extension agreement under which it will supervise the operation of a business,

YALE LAW JOURNAL, Jan. 29, 1937, from W. Randolph Montgomery, General Counsel, National Association of Credit Men. "The statutory provisions differ widely, however, and in many jurisdictions it is possible to handle assignments even in the light of statutory provisions, with more expedition and economy than attends bankruptcy proceedings. This is certainly not the case, however, in New York." Communication to YALE LAW JOURNAL from W. Randolph Montgomery, Feb. 8, 1937. Bills amending the assignment statute have been introduced in the New York State Legislature in recent years. See, *e. g.*, Assembly Bill No. 2064, Int. 1860 (1935).

48. State statutes granting a complete discharge are in conflict with the Bankruptcy Act and invalid. (1933) 42 YALE L. J. 1140. A state statute permitting a debtor to make an assignment for the sole benefit of those creditors who grant him a release is not in conflict with the Bankruptcy Act. Johnson v. Star, 287 U. S. 527 (1933), (1933) 42 YALE L. J. 1140.

49. (1931) 5 J. N. A. REF. BANKR. 170, 171; STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 69. It is often impossible to find three non-consenting creditors who are willing to lend their names to a petition. *Ibid.*

50. STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 69. The appointment of someone other than the assignee as receiver is necessary in fraudulent assignments. Some courts refuse to appoint even an honest and capable assignee as receiver. *Joint Hearings, supra* note 11, at 800. The better practice is to decide whether or not to allow the assignee to continue after an examination of each case on its merits, rather than to establish a blanket rule. Communication to the YALE LAW JOURNAL from Judge John C. Knox, Jan. 15, 1937.

51. These bureaus are carefully supervised by the National Association of Credit Men. On friendly adjustments in general, see Billig, *What Price Bankruptcy: A Plea for "Friendly Adjustment"* (1929) 14 CORN. L. Q. 413; Billig, *Extra Judicial Administration of Insolvent Estates: A Study of Recent Cases* (1930) 78 U. OF PA. L. REV. 293; Douglas and Marshall, *A Factual Study of Bankruptcy Administration and Some Suggestions* (1932) 32 COL. L. REV. 25, 42.

52. An assignment is made to protect against attachment while the composition agreement is being negotiated.

eliminate management errors, and eventually, in many cases, return a business to the owner with all debts paid.[53] By realizing more on assets, and by administering more efficiently and expeditiously,[54] the skilled, permanent staffs of adjustment bureaus, freed from technical procedural and legalistic limitations, are able to conduct liquidations more successfully than bankruptcy administrators.

While the advantage of a competent personnel is limited for the most part to adjustment bureaus or similar organizations, other benefits are shared alike by all assignments.[55] A debtor who makes a bona fide assignment is said to carry a lesser stigma, to be able to negotiate a more favorable composition or extension agreement and to be in a better position to secure credit in a new business venture, than a debtor who avails himself of, or is forced into, bankruptcy.[56] These advantages, it is maintained, induce a debtor to come to terms at an early stage of insolvency so that creditors profit by a shortening of the critical period as well as by the retention of customers in business and by an avoidance of publicity on credit losses.[57] The generally conceded superiority of friendly adjustments to the present bankruptcy system[58] has fostered occasional legislative attempts at protecting bona fide assignments.

If legislation dealing with assignments is not to destroy the out-of-court atmosphere and freedom from legalistic restrictions which assignments enjoy, assignments must be protected and implemented with statutory powers without subjecting them to the dominion of a court. It is naturally difficult to draft such a provision without losing control over fraudulent assignments.[59]

53. Although at common law continuation of a business makes an assignment void against an attaching creditor [GLENN, LIQUIDATION (1935) § 112], assignments of this character have been employed frequently and with conspicuous success. Some state statutes confer specific authority to continue operation. Legis. (1933) 20 VA. L. REV. 222. A decision as to whether a business should be continued is often made by a creditors' committee experienced in the business concerned.

54. For a list of some of the economies which can be effected by a large scale liquidating organization, see p. 1198 *infra*. See also articles cited *supra* note 51. Adjustment bureaus charge a 10% fee for their services.

55. In some cases estates may be disposed of more expeditiously without invoking the machinery of the adjustment bureaus. Comment (1932) 41 YALE L. J. 603, 604.

56. See DONOVAN, *op. cit. supra* note 2, at 153.

"The answer to this question (whether there is less of a stigma attached to proceedings under the Deeds of Arrangement Act than under the Bankruptcy Act) is in the affirmative. English bankruptcy legislation involves a public examination into conduct by the Court and publicity in the local press which is almost entirely absent in the case of Deeds of Arrangement." Communication to the YALE LAW JOURNAL from the British Inspector General in Bankruptcy, March 1, 1937.

57. Critical period shorter: Fürth, *supra* note 8, at 861; Donovan, *op. cit. supra* note 2, at 162. *Contra: Joint Hearings, supra* note 11, at 521. Publicity avoided: Cover, *supra* note 42, at 88.

58. See articles cited note 51 *supra*. For a less adulatory appraisal of friendly adjustments, see Gamer, *On Comparing "Friendly Adjustment" and Bankruptcy* (1930) 16 Corn. L. Q. 35.

59. Friebolin, *The Proposed Amendments to the Bankruptcy Law* (1932) 37 COMM. L. J. 564, 567; (1931) 5 J. N. A. REF. BANKR. 170, 172.

The Hastings-Michener Bill provided that assignments to authorized trustees filed in a court of bankruptcy would no longer be acts of bankruptcy.[60] The assignees, replaceable by a majority vote of creditors at a meeting within five days, were to be given the powers of a trustee and to be subjected to close supervision by the court, and debtors were to be granted a discharge without adjudication. That proposal, however, made assignments too completely an in-court proceeding.[61] Because of widespread lawyer opposition to "legalization" of assignments, the draftsmen of the Chandler Bill made no overt provision for assignments, although they hoped by improving the operation of the composition section to facilitate the conduct of those friendly adjustments which terminated in compositions or creditor supervision of management under an extension agreement.[62] Since the Bill also allows the use of consents obtained before the institution of the proceedings[63] and requires an assignee to account to the court of bankruptcy,[64] it is expected that when unanimous consent of creditors to an assignment can not be obtained, the

60. This provision is discussed in detail in STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 72. For a similar proposal, see Douglas and Marshall, *supra* note 51, at 45. Assignments are legalized by statute in almost every country.

61. Some of the bureaus conducting adjustments objected to the proposal on this ground. *E. g., Joint Hearings, supra* note 11, at 731. On the other hand the provision met with the approval of W. Randolph Montgomery, general counsel for the National Association of Credit Men. *Joint Hearings, supra* at 451; Montgomery, *Bankruptcy's New Broom* (1932) 6 J. N. A. REF. BANKR. 146. The provision was generally approved by creditors. See, *e. g., Joint Hearings, supra* at 456, 697.

62. "There was wide-spread opposition to the provisions of the Hastings-Michener Bill with respect to out of court assignments. The National Bankruptcy Conference came to the conclusion that a better way out of the situation was to revise the composition section of the Bankruptcy Act (Section 12) to enable all those things to be done in an "arrangement" proceeding under Section 12 which are now possible in out of court assignments . . . We have attempted to make Section 12 as rewritten sufficiently flexible to cover all practical situations." Communication to the YALE LAW JOURNAL from W. Randolph Montgomery, general counsel for the National Association of Credit Men, and member of the drafting committee of the National Bankruptcy Conference, Jan. 8, 1937. Some lawyers cooperate fully with adjustment bureaus. Billig and Billig, *A Realistic Approach to the Study of Insolvency Law* (1931) 16 CORN. L. Q. 542, 569.

63. § 12-Id(3)(d). "Sec. 12-I expressly provides that consents may be obtained before the institution of a proceeding. This was written into the bill, at my suggestion, for the very purpose of strengthening the position of the creditors in out-of-court proceedings." Communication to the YALE LAW JOURNAL from W. Randolph Montgomery, Jan. 29, 1937.

64. § 2a(21); § 70a(8). The only other provision of the bill which affects assignments makes it simpler to throw assignments into bankruptcy by providing that estopped creditors shall not be counted in determining whether there are fewer than 12 creditors of the bankrupt. § 59e(3). In such cases one creditor rather than the customary three can file a petition. For a suggested amendment to the contrary, see *Joint Hearings, supra* note 11, at 764. Contrast the suggestion that creditors who consent to an assignment be permitted to file a petition. Olmstead, *The Development of the Bankruptcy Laws* (1924) 1 AM. BANKR. REV. 151, 153.

necessary papers will be prepared and either actually filed or held ready for filing at a moment's notice under the new Arrangement Subsection.[65] But consents, once secured, can in most cases be obtained again; and although a requirement that an assignee account is likely to furnish more adequate control over unscrupulous assignees, it is hardly calculated to induce adjustment bureaus to avail themselves freely of the Arrangement Subsection. And since the somewhat broader scope and the simplified procedure of the proposed Subsection do not seem to provide advantages substantial enough to induce bureaus, which have hesitated to use Section 74, to submit to court control, nuisance creditors are hardly likely to be curbed by the proposed bill. Even if adjustment bureaus feel no compunction about filing under the Arrangement Subsection, it is probable that those referees who view all assignments with suspicion, and friendly adjustments with antagonism,[66] may refuse to confirm proposals providing for supervision by an adjustment bureau, since the Bill does not specifically refer to plans of that character. And in any event, even if the Chandler Bill attained its objectives in this respect, it would not assist the large number of friendly adjustments which are made in order to liquidate a debtor's estate out of court.

It is suggested that the only way to steer between court control of friendly adjustments and lack of supervision over fraudulent assignments is to deprive minority creditors of power to throw into bankruptcy any assignment approved by a majority of creditors which carries provisions preserving to a debtor his exemptions and releasing him from all his obligations. Safeguards would be erected by clothing referees with discretionary power to place an assignment in bankruptcy or to appoint, with debtor and majority creditor approval, a new assignee or make other appropriate orders, upon the petition within four months of any creditor or of any assignee.[67] It might also be provided that an assignee who filed an assignment with the approval of a majority of creditors could be given the powers of a trustee, if the referee approved.[68] And while the exercise of the discretion of a minority of referees may be influenced by antagonism towards assignments and interest in bringing assignments into bankruptcy, that danger can be guarded against to some extent by a legislative policy declaration in favor of legitimate assignments and by supplanting the fee system of compensation for referees with a salary system. Threats by nuisance creditors to bring bankruptcy actions would then be of little concern to bona fide assignments since such actions would be doomed to failure.

65. Communications to the YALE LAW JOURNAL from W. Randolph Montgomery, Jan. 8, 29, 1937.

66. See Douglas and Marshall, *supra* note 51, at 43; *Joint Hearings, supra* note 11, at 687; (1931) 5 J. N. A. REF. BANKR. 170, 172; Comment (1932) 38 W. VA. L. REV. 352 (disqualification of bureaus as bankruptcy trustees); (1936) 10 J. N. A. REF. BANKR. 94.

67. Compare the suggestion that assignments be made acts of bankruptcy only when a majority of creditors have not approved. *Joint Hearings, supra* note 11, at 702.

68. *Cf.* Douglas and Marshall, *supra* note 51, at 47.

This provision would set up a uniform assignment system[69] and in all likelihood would eliminate most of the disadvantages under which assignments now labor without destroying the desirable out-of-court atmosphere. And since consent of a majority of creditors would be required, assignments would not be likely to acquire a new stigma by being completely substituted for voluntary bankruptcy in commercial cases.[70]

Wage Earner Amortization. While the Bankruptcy Act allows a wage earner to obtain a discharge from all his debts in a voluntary proceeding and protects him, when he earns less than $1,500 a year or owes less than $1,000, from subjection to involuntary bankruptcy,[71] no proceeding adapted to his peculiar situation has ever been incorporated into the Act. In many cases a wage garnishment compels a debtor, willing and able to pay his debts out of his future earnings, to seek a discharge in bankruptcy in order to live decently and to retain his job,[72] or if he wishes to avoid the stigma of bankruptcy, to borrow money at high interest rates without reducing his total indebtedness.[73] Nor do the bulk of creditors approve of forcing a debtor to pursue either of these courses.[74] Since debtors are rarely willing to pay their

69. In the absence of specific statutory declaration, such a provision would probably be held to supersede state assignment statutes. It may be advisable, however, to retain state statutes with minimum requirements to provide further control over fraudulent assignments.

70. But *cf.* Sanderson, *A Criticism of the Proposed Bankruptcy Act* (1932) 37 COMM. L. J. 374, 378.

71. §4; §1(27). Suggestions have been advanced that debts for necessities of life be exempted from a discharge and that a minimum amount of debts be set up as a prerequisite for a voluntary petition. *Joint Hearings, supra* note 11, at 2, 4; (1931) 5 J. N. A. REF. BANKR. 179, 182 (similar Canadian provisions). These provisions would of course operate mainly to deprive wage earners of the benefits of voluntary bankruptcy. For a suggestion that wage earners and farmers be deprived of their exemption from involuntary bankruptcy, see (1915) 80 CENT. L. J. 32. That all bankruptcy proceedings should be limited to traders, see King, *Bankruptcy Law and Practice* (1927) 7 MICH. S. B. J. *47, *56. Wage earners are also given a priority of $600 each for claims earned within three months of bankruptcy. §64b(5).

72. Wage earner cases comprise one-half of the bankruptcy total. STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 8, 85. That garnishment is often the precipitating cause of many bankruptcies, see DEPARTMENT OF COMMERCE, CAUSES OF BANKRUPTCY AMONG CONSUMERS (Domestic Commerce Series, No. 82) (1933); Douglas, *Wage Earner Bankruptcies—State vs. Federal Control* (1933) 42 YALE L. J. 591, 614 *et seq.* For a method of reducing garnishments, see Sturges, *A Proposed State Collection Act* (1934) 43 YALE L. J. 1059 (priority in collection proceedings according to date of credit extension). On the general problem of collection remedies, see Radin, *Debt* (1931) 5 ENCYC. SOC. SCIENCES 32; Sturges and Cooper, *Credit Administration and Wage Earner Bankruptcies* (1933) 42 YALE L. J. 487. On wage assignments, see Fortas, *Wage Assignments in Chicago—State Street Furniture Co. vs. Armour & Co.* (1933) 42 YALE L. J. 526.

73. See STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 83.

74. Many creditors are forced to garnishee a debtor for self-protection against other creditors. CAUSES OF BANKRUPTCY AMONG CONSUMERS, *op. cit. supra* note 72, at 8.

debts after they have been forced into bankruptcy, creditors have heartily endorsed the proposal for "debtor relief" of the Hastings-Michener Bill, which provided that a debtor who agreed to pay his debts out of future earnings over a period of time would be freed from the onus of bankruptcy and protected from garnishment proceedings.[75] While that provision was never enacted, several bankruptcy courts have stretched Section 74 in order to set up special machinery for wage earner amortization,[76] and several states have enacted statutes modeled after the bill.[77] In order to increase the use, scope and flexibility of such proceedings, the National Bankruptcy Conference incorporated a special section for wage earner amortization into its omnibus measure.

Under the Chandler Bill, a debtor earning less than $3,600 a year may file an original petition or a petition in a bankruptcy proceeding, before or after adjudication, stating that he is insolvent or unable to meet his debts as they mature, and that he desires to effect a settlement out of his future earnings.[78] This petition is to act as a stay of adjudication, although, if necessary, the court may require indemnity when bankruptcy proceedings are pending.[79] The debtor is to file a statement of affairs as a basis for the consideration of the plan submitted by him at the first meeting of creditors.[80] The plan is to include provisions for a settlement on any terms with unsecured creditors and may include provisions dealing with secured creditors severally.[81] In order to protect against garnishment, the debtor's future earnings are to be placed under the supervision of the court.[82] While the court is empowered to issue all orders necessary to effectuate the plan—including orders, with the effect of a judgment, to any employer of the debtor[83]— it may, on the other hand, extend the time to cure a default[84] and also modify the time or amount of payments when the circumstances of the debtor warrant or require.[85] In addition, the plan may provide for the rejection of executory contracts and for any other matters not foreclosed by specific provisions of the Subsection.[86] When a majority of unsecured creditors and all affected secured creditors,

75. The bill is described in STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 77.

76. The federal court in Birmingham used the section most frequently. For a list of other federal courts which have used § 74 for this purpose, see Comment (1934) 43 YALE L. J. 1285, 1289; see also (1936) 11 J. N. A. REF. BANKR. 32.

77. See Minahan, *Wage Earner Garnishment: A Plan for Personal Receivership* (1935) 10 WIS. L. REV. 222; Legis. (1934) 9 WIS. L. REV. 177. See note 94, *infra*.

78. § 12-IVb(1); § 12-IVa(2)(a).

79. §12-IVb(3).

80. § 12-IVb(2).

81. § 12-IVc(1). The plan may also provide for priority of payment during the period of extension as between the secured and unsecured debts affected by the plan. *Ibid.* But claims secured by estates in real property or chattels real may not be included within a plan of amortization. § 12-IVa(2)(b).

82. § 12-IVc(2); § 12-IVe(3)(b); § 12-IVf(1)(a).

83. § 12-IVe(3)(c).

84. § 12-IVe(5)(b).

85. § 12-IVc(2).

86. § 12-IVc(3), (4).

before or after the institution of court proceedings, have approved, the court is to confirm the plan if it is equitable, feasible, and for the best interests of creditors,[87] and to appoint a trustee to receive and distribute the earnings of the debtor.[88] A debtor who files an original petition may not be adjudicated without his consent.[89] Discharges are to be granted without adjudication upon completion of all payments, but where a debtor's default is excusable, he may be granted a discharge three years after the inception of the plan.[90] The single deposit for costs, expenses, or priorities is a maximum of $15 to indemnify the referee.[91] Commissions to the referee and trustee are payable only upon actual distribution of periodic dividends.[92]

Objections to the wage earner provisions of the Chandler Bill may be made on three scores: that it is impracticable for a substantial number of wage earners to amortize their debts under any scheme or, more particularly, under the Chandler Bill; that even if practicable, it is undesirable for wage earners to do so; and finally that, if practicable and desirable, amortization should not be conducted in the federal courts.

In view of the marked success with which amortization has been conducted by private companies,[93] state and foreign courts, and federal bankruptcy courts,[94] large scale amortization appears practicable, especially if the debtors are induced to amortize before resorting to loan companies.[95] The experiences of the Municipal Court in Cleveland under the trusteeship statute and of the federal bankruptcy court in Birmingham under Section 74 since the institution of amortization proceedings in both courts in the middle of 1933 indicate that many debtors are both willing and able to amortize their debts. From that time until the end of 1936, 1,577 applications for trusteeships had been filed

87. § 12-IVe(1), (2), (3).
88. § 12-IVd(2)(d).
89. § 12-IVe(5).
90. § 12-IVe(7).
91. § 12-IVd(2)(b).
92. § 12-IVe(4).

93. See Douglas and Marshall, *supra* note 51, at 53; Minahan, *supra* note 77, at 246; Nugent, *Devices For Liquidating Small Claims in Detroit* (1935) 2 LAW & CONTEMP. PROB. 258, 262; (1931) 5 J. N. A. REF. BANKR. 181; *Joint Hearings, supra* note 11, at 581.

94. State statutes have been adopted in Ohio (for a number of municipal courts), Michigan, Minnesota, and Wisconsin. For a discussion of the statutes, see Douglas, *supra* note 72, at 636; Minahan, *loc. cit. supra* note 77; Nehemkis, *The Boston Poor Debtor Court—A Study in Collection Procedure* (1933) 42 YALE L. J. 561, 563, n. 9; Nugent, *loc. cit. supra* note 93. A similar Nebraska statute [NEB. COMP. STAT. (1922) § 248-259] has been repealed. The small claims statutes also generally provide for amortization of a single claim. See Nehemkis, *loc. cit. supra*; Nugent, *loc. cit. supra*; N. Y. Times, Feb. 12, 1937, p. 25, col. 1. As to federal courts see note 76 *supra*. For a discussion of the English amortization system, see Holm-Nielsen, *The Problem of Wage Earner Bankruptcies and Its English Solution* (1935) 9 J. N. A. REF. BANKR. 103; (1904) 117 L. T. 560; (1908) 125 L. T. 122, 188.

95. Compare STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 80, with Douglas, *supra* note 72, at 626, and *Joint Hearings, supra* note 11, at 623. For a discussion of the enormous borrowing by wage earners, in many cases to consolidate existing indebtedness, see Minahan, *supra* note 77, at 224; *Joint Hearings, supra* at 11.

in the Cleveland court. A total of $163,828.67, almost all of which has been disbursed through 41,023 checks, was received from debtors owing an average of $550. The cost of operation of the department amounted to $11,000, none of which has been assessed against the estates. Of the 923 trusteeships thus far dissolved, 40% were carried through completely; 23% were dropped voluntarily by the debtor with two-thirds or three-fourths of his debts paid up; 20% were dropped voluntarily by the debtor within 60 days of the filing; 10% were abated by the debtor filing a bankruptcy petition; and in 7% no payment was ever made. It thus can be seen that over 60% of the debtors using the trusteeship statute paid off the bulk of their indebtedness.[96] In Birmingham 340 of the 1,800 wage earners who have used the special machinery set up under Section 74 have paid their debts in full. Most of the cases are still pending, only 187 having thus far been dismissed. Of the $268,854.94 collected by the court, $84,845.03 was disbursed during 1936.[97] Both courts report that these proceedings carry less of a stigma than do bankruptcy proceedings; that numerous bankruptcies have been prevented by amortization; that all classes of creditors cooperate, since they are returned a substantial amount with little or no expense; and that the wage earner has been freed from the annoyance of creditors, high court costs, and possible loss of employment.[98] Some have maintained, on the other hand, that most applicants are sensitive to the implication that it is necessary for a public official to handle their family finances and that wage earners are forced to invoke the amortization procedure through pressure by employers or creditors.[99]

While the practicability of amortization is shown by its successful use in different localities,[100] it does not necessarily follow that the method of amortization provided by the Chandler Bill will operate as successfully as those considered. The bill, it is true, proceeds with an initial advantage over other systems by permitting debts to be scaled down as well as extended without interest payments, and by offering relief to the large class earning less than

96. These figures are based on information furnished the YALE LAW JOURNAL by Chief Justice Burt W. Griffin and Judge David Moylan of the Municipal Court of Cleveland.

97. Communication to the YALE LAW JOURNAL from Referee Valentine J. Nesbit, special referee for amortization proceedings in Birmingham, Alabama, Feb. 28, 1937.

98. Communications to the YALE LAW JOURNAL from Chief Justice Griffin and Referee Nesbit, Feb. 4, 1937. See notes 96, 97, *supra*. Amortization also effects a large saving in interest charges, by making it unnecessary for wage earners to resort to loan companies. STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 83.

99. Nugent, *supra* note 93, at 266.

100. For suggestions that local conditions may make for successful use of amortization, see Comment (1934) 43 YALE L. J., 1285, 1289. Amortization is likely to operate successfully only where the required payments are less than can be obtained by garnishment. Nugent, *supra* note 93, at 267. But *cf.* Sturges and Cooper, *loc. cit. supra* note 72. It may be noted that wage assignments are virtually prohibited in Ohio. Fortas, *Wage Assignments in Chicago* (1933) 42 YALE L. J. 526, 552, n. 87.

$3,600 per year.[101] On the other hand, the power given the court to order an employer to pay the debtor's wages into court will probably elicit little debtor support,[102] not only because an amortization notice is likely to prove as annoying to an employer as a notice of garnishment[103] but also because a wage earner apparently has no power to terminate a plan when he desires. While the bill is not clear, the granting of this power to the court seems to indicate that, at least so long as a debtor remains employed, default will not be permitted and delinquencies will be checked by ordering the employer to pay the sums due into court.[104] If debtors are to be induced to invoke the Bill, a wage earner should have the power to terminate the proceedings at any time, with or without filing a bankruptcy petition,[105] even though the incorporation of such a provision into the bill operates to reduce its efficiency as a collection medium.[106] Wage earners are more likely to be attracted to proceedings under the Chandler Bill, moreover, if the court's power to adjust the time and amount of payments is limited to reductions and extensions. While a wage earner who files an original petition is protected against adjudication without his consent,[107] his right to a discharge in subsequent bankruptcy proceedings might well have been safeguarded by providing that neither the failure to complete payment under a plan nor any other delin-

101. Those wage earners who would not be entitled to a bankruptcy discharge may not secure relief. § 12-IVe(2). A similar provision is contained in the Arrangement Subsection. § 12-Ie(4). Since consummation of plans under both of these sections benefits creditors, these penalties seem a futile gesture. *Cf. Joint Hearings, supra* note 11, at 745.

102. If curtailment of collection remedies does have an effect on extension of credit [see *infra* p. 1207], a debtor may have difficulty in obtaining new credit since he must submit his future earnings to the supervision of the court and since confirmation of a plan does not operate as a discharge. If this possibility is to be precluded, priority should be allowed to new obligations assumed with court approval. Such a provision is made in the Arrangement Subsection. § 12-Ic(6). But see Minahan, *supra* note 77, at 237.

103. Several large Ohio employers have refused to honor assignments issued by employees under the Ohio amortization statute. Communication to the YALE LAW JOURNAL from Chief Judge Burt W. Griffin of the Cleveland Municipal Court, Jan. 28, 1937.

104. Another provision of the act seems clearly to contemplate voluntary default and termination of the proceedings. Section 12-IVe(5) provides that in case of default in an original proceeding the court shall enter an order dismissing the proceeding. The further provision [§ 12-IVe(5)(b)] that the court may extend the time to cure a default may be brought in harmony with the interpretation suggested in the text by assuming that the default contemplated referred to one caused by loss of employment.

105. *Cf.* McKeever v. Local Finance Co., 80 F. (2d) 449 (C. C. A. 5th, 1935).

106. The best results were secured under amortization in Ohio where definite assignments of wages were secured from the employee. Communication to the YALE LAW JOURNAL from Chief Judge Griffin of the Cleveland Municipal Court, Jan. 28, 1937. For a discussion of various methods of dealing with wages under amortization plans, see Minahan, *supra* note 77, at 230.

107. For a suggestion that wage earners who default unjustifiedly should be adjudicated, see Douglas and Marshall, *supra* note 51, at 55.

quency should prejudice that right.[108] Indeed it would have been helpful to allow a debtor whose default is excused to obtain an immediate discharge without going into bankruptcy, instead of forcing him to wait until three years after the confirmation of the plan to obtain a discharge without adjudication.[109] Although the consent of unsecured creditors can probably be readily obtained, there may be occasional difficulty in gaining the approval of secured creditors. It may be wise, therefore, to delete the requirement of creditor consent, or at least to allow a majority of all creditors to bind secured creditors.[110] While the bill attempts to keep costs and deposits down to a minimum, it is questionable whether fees are small enough, although a determination of this problem depends upon experience in the administration of the Act.[111] It would be sound policy to require that one referee handle all such cases, and that one trustee—whether referee, clerk of court, special official, or private individual or corporation—be appointed to act in all cases, since the limited functions of the trustee and the small size of the cases will make specialization a prerequisite to efficient administration.[112] Despite these defects the Chandler Bill is probably as well conceived to handle amortization cases as any of the schemes now in use.

Although it may be practicable for wage earners to amortize their debts under the Chandler Bill, it may be questioned whether the efficiency of the provision as a collection proceeding is not counteracted by social disadvantages.[113] It is likely that the bulk of wage earners can pay their debts within a reasonable period of time only by severely reducing their standard of living[114] or, if they are not assisted in budgeting, by acquiring a new set of unpaid obligations. This sacrifice can be minimized in severity and duration

108. *Cf. Joint Hearings, supra* note 11, at 22, 26.

109. *Id.* at 26.

110. *Cf.* Douglas and Marshall, *supra* note 51, at 56. All classes of creditors have cooperated in amortizations under § 74. Communication to the YALE LAW JOURNAL from Referee Valentine J. Nesbit, Feb. 28, 1937. The section further errs in excluding realty from its scope. § 12-IVa(2)(b).

111. In the administration of amortization provisions an attempt should be made to keep procedure simplified so that the services of lawyers can be dispensed with. Debtors should be encouraged to deal directly with referees. *Cf. Joint Hearings, supra* note 11, at 21.

112. See pp. 1198, 1203.

113. The danger that with the establishment of amortization debtors who used bankruptcy will be subjected to a greater stigma than formerly and that their applications for discharge may be granted less readily does not seem too serious, and in any case can be guarded against to some extent by a specific statutory declaration that those wage earners who invoke bankruptcy should not be prejudiced in their applications for discharge.

114. Douglas, *supra* note 72, at 631; Comment (1934) 43 YALE L. J. 1285, 1292. Objections to the amortization provision of the Hastings-Michener Bill were grounded partially on the coupling of that provision with one for suspended discharge. See Sturges and Cooper, *supra* note 72, at 493.

under the Chandler Bill by scaling down debts substantially.[115] But since wage earners may often be induced to undertake unbearable burdens by creditor or employer pressure, or by overoptimism, it may be preferable to appoint a special official in large urban areas, at least, to handle such cases, so that approval would not be given perfunctorily, but only after consideration of the desirability of outright discharge in the light of experience of similarly situated wage earners. The Bill might also set a two-year limit for such amortization agreements,[116] and supplement the referee's power to modify the time and amount of payment with power to dismiss the proceedings and grant a discharge when he thought that continued payments were no longer possible or would impose too great a hardship. Under no condition should a wage earner be compelled to continue payments after an agreement has become distasteful. These methods of protecting debtors from severe reduction of their living standards under amortization plans seem preferable to the suggestion that the debtor make very small payments over a long period, even when that proposal is made practicable by providing for immediate payment to creditors of discounted dividends by a central government amortization fund;[117] for if the desirability of subjecting debtors to protracted, though small, payments be conceded, government subsidization of creditors by purchase of bad debt claims can hardly be approved.

Some of those who concede the practicability and desirability of amortization question the wisdom of a federal rather than a state amortization system,[118] or indeed of any provision for court amortization.[119] The claim that the states should control an amortization system because amortization is intimately bound up with collection remedies which states alone regulate is not persuasive, since amortization has no necessary connection with collection remedies. There is little force in the objections to having federal officials collect small claims or to increasing the business of already crowded federal courts,[120] because state governments can neither scale down obligations initially nor grant discharges to debtors who do not complete payments without unanimous creditor consent.[121]

115. A criticism levelled at the operation of the Michigan statute was the inability to provide for reduction of indebtedness. Nugent, *supra* note 93, at 268. *Cf.* Douglas and Marshall, *supra* note 51, at 57.

116. The Bill fails to provide an express time limit for plans. The only related provision vests the court with power to grant a discharge if the debtor has not completed payment at the expiration of three years through no fault of his own. § 12-IVe(7).

117. See Holm-Nielsen, *loc. cit. supra* note 94. A lengthy period of amortization would generally be valueless to creditors.

118. Douglas, *supra* note 72, at 637.

119. Nugent, *supra* note 93, at 266.

120. See Sturges and Cooper, *supra* note 72, at 494. The objection that a federal provision for amortization would be unconstitutional as not within the bankruptcy power does not seem well-founded. *In re* Landquist, 70 F. (2d) 929, (C. C. A. 7th, 1934), *cert. denied*, 293 U. S. 584 (1935).

121. (1933) 42 YALE L. J. 1140; Legis. (1934) 9 WIS. L. REV. 177. Since it is not certain that the courts would hold that state amortization statutes were superseded

There are those who insist, on the other hand, that real relief can be secured only through out-of-court proceedings since a wage earner, willing to amortize through a small loan company, may hesitate to chance the stigma of court proceedings.[122] A court provision is essential, though, because no existing private organizations provide a service of this sort on a large scale. There remains the question of what protection, if any, should be accorded out-of-court amortizations. The Chandler Bill attempts to discourage minority obstruction of such amortizations by allowing the use of consents obtained before the institution of proceedings. These amortizations might be encouraged more effectively by adopting a provision similar to that suggested in connection with common law compositions.[123] But it is probably not wise to strengthen extrajudicial arrangements, even if the provisions of the Chandler Bill do not operate successfully, since there is a grave danger that wage earners may be imposed upon by private organizations,[124] and that they may undertake obligations payable only with the greatest of difficulty.

While amortization in the federal courts is probably practicable from the viewpoint of collection, reduced living standards may accompany amortization even if the suggested safeguards are adopted. If these protective devices are provided, however, the benefits to debtor morale through amortization,[125] if they are real and not illusory,[126] should make desirable the enactment of this fundamentally "creditor" measure.[127]

Increasing Dividends on Liquidation

The small dividends distributed to creditors through bankruptcy may be attributed largely to dissipation of assets before the filing of a petition, but a considerable loss results from improper administration after an estate is brought into bankruptcy.[128] One of the most obvious methods of increasing

by a federal amortization provision [see Minahan, *supra* note 77, at 228, n. 19], a specific legislative statement of intention might help to indicate that state statutes are to be superseded in order to guard against the operation of competitive systems.

122. Nugent, *supra* note 93, at 266.

123. See p. 1184 *supra*.

124. That control of amortization by employers is also unsound, see Cover, *op. cit. supra* note 42, at 66.

125. Communications to the Yale Law Journal from Referee Nesbit and Judge Moylan.

126. Referee Paul H. King, chairman of the National Bankruptcy Conference has stated that it is "fanciful" to attempt to remove the "stigma" of bankruptcy by "debtor" proceedings. (1933) 7 J. N. A. Ref. Bankr. 98, 100. See also note 33, *supra*.

127. Retail credit organizations have wholeheartedly supported amortization provisions. Douglas, *supra* note 72, at 631, n. 116; Mullinix, *Credit and Bankruptcy Reform* (1935) 40 Comm. L. J. 196. And see *Joint Hearings, supra* note 11, at 681: "Of course, anyone who grants credit would naturally be in favor of it, because it provides a way by which some of those old debts may be paid."

128. Hanna, *The Receiver in Bankruptcy: An Introduction to Bankruptcy Reform* (1930) 3 So. Calif. L. Rev. 241, 258; see note 1 *supra*. The low dividends are partially attributable to the large proportion of small asset cases, where expenses eat up the bulk

realization on assets and of reducing administrative expenses is to improve the personnel of bankruptcy administration. The Bankruptcy Act leaves to creditor initiative the selection of a trustee, examination of the debtor and opposition to discharge. But the prevalence of absentee creditors and the probability of small dividends combine to make creditor interest in bankruptcy proceedings virtually non-existent so that trustees are chosen by proxy-solicitors, interested only in prospective fees and expenses, and discharges are almost uniformly granted without investigation or contest.[129] Moreover, incompetent receivers are frequently appointed by courts to take over an estate before the trustee is elected.[130]

To establish an efficient administrative system, receiverships and trusteeships must be entrusted in each district to one or a limited number of adequately compensated public officials, or private individuals or organizations, rather than to a large inexperienced group. Under the regime of a skilled, permanent, and specialized liquidator, all necessary steps would be taken at the proper time; an accounts receivable collection department would be set up; connections would be established with prospective buyers to allow advantageous disposition of goods at private sales; and the discovery of preferences would be aided by an examination and an audit in every case.[131]

Two basic systems have been proposed to effect this result. One calls for the appointment of salaried government liquidators or private individuals or organizations in cities of over 250,000 population to administer either all cases or those in which assets are less than $5,000. A second plan would limit trusteeships to licensed trustees appointed by the court but replaceable by creditors, or elected by creditors originally.[132] Despite the opportunity for

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of assets. Wage earner cases comprise more than half the total. Only 21% of the cases involve merchants and manufacturers. STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 7.

129. For descriptions of these and other evils detailed later, see STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 31; DONOVAN, *op. cit. supra* note 2, at 78. For a list of other reports, see Clark, *Reform in Bankruptcy Administration* (1930) 43 HARV. L. REV. 1189, n. 1. Nor are these defects localized. COMER AND JAMES, A CRITICAL ANALYSIS OF THE BANKRUPTCY ACT OF OHIO (1927). The deficiencies of the Bankruptcy Act have been well epitomized by former Solicitor-General Thacher: "If there is any agency less competent than a court to carry on the business of liquidating an estate, it is a general town meeting. The bankruptcy act requires the cooperation of both." See DONOVAN, *supra*, at 234.

130. See articles cited *supra* note 129.

131. Clark, *supra* note 129, at 1314. These are the advantages which accrue to adjustment bureaus because of their specialized organizations. But see Sturges and Cooper, *supra* note 72, at 492. The Irving Trust Company, as official receiver in New York City, prepared a list of 47 steps that were necessary in the administration of any bankruptcy. See Hanna, *supra* note 128, at 262. Obviously a liquidator, acting only occasionally, could not properly hope to attend to all details.

132. See Coles, *The Donovan Report on the Bankruptcy Law and Administration* (1930) 16 A. B. A. J. 431, 432; DONOVAN, *op. cit. supra* note 2, at 29; STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 104. Both of these plans would except cases where special circumstances required the services of an unofficial or unlicensed liquidator.

political abuse, either of these plans is to be preferred to the present chaotic system of selection. The success of state departments of banking and of the federal comptroller of the currency in liquidating banks, and of the Irving Trust Company as standing receiver in the Southern District of New York indicates that official liquidators, whether public or private, can operate efficiently.[133] And experience in Canada and England demonstrates that it is possible to license trustees with a minimum of political control.[134]

A system of official liquidators is to be preferred, however, to a licensing system.[135] Licenses would necessarily be issued to some inefficient and dishonest trustees, since there are few developed organizations; licensed liquidators could not easily be induced to accept the small unprofitable cases which comprise 90% of the business of liquidation; and the granting of numerous licenses would impede the development of large-scale liquidating organizations, especially in smaller cities.[136] Moreover, a dual set of officials can be eliminated under a licensing system only by dispensing with the prompt appointment of a receiver. If it is desired to retain the benefits of official liquidation, but to allow creditor election of trustees, official receivers might be appointed. Trusteeships could be confined almost exclusively to these officials if they were permitted to notify creditors of their availability to act as trustee and to send proxies with proofs of claims.[137]

The Chandler Bill makes no serious effort to provide for adequate personnel. While the bill deletes the prohibition—aimed at the Irving Trust Company—of the appointment of a standing receiver in any district,[138] and gives the court power to remove a trustee on its own motion and to appoint a trustee when one fails to qualify,[139] it makes no affirmative provision for

133. DONOVAN, *op. cit. supra* note 2, at 12; Hanna, *supra* note 128, at 250, 256; Hanna, *Government Supervision of Bankruptcy Administration* (1932) 7 J. N. A. REF. BANKR. 30, 32; (1932) 9 AM. BANKR. REV. 117. But *cf.* 9 *id.* 157.

134. DONOVAN, *op. cit. supra* note 2, at 91; Hanna, *supra* note 128, at 254.

135. Coles, *supra* note 132, at 435. But *cf.* Communication to the YALE LAW JOURNAL from William J. Reilley, Superintendent of Bankruptcy, Canada: "As stated before it is not possible to compare the relative merits of the Canadian system with a system of official trustees, but I am of the opinion that the present system is much better than even that of official trustees for the reason that it does maintain a direct control over trustees as compared with the arbitrary acts of officials with administrative responsibility that are so much a feature of bureaucratic administration."

136. *Joint Hearings, supra* note 11, at 366; (1935) 9 J. N. A. REF. BANKR. 140; (1936) 11 J. N. A. REF. BANKR. 24.

137. A similar procedure was followed in the Southern District of New York with the Irving Trust Company. Report of the Irving Trust Co. as Receiver from Jan. 16, 1929 to Sept. 30, 1932. The Trust Company was elected trustee in 80-90% of all cases. Report of the Irving Trust Co. as Receiver from Jan. 16, 1929 to June 30, 1933, p. 20.

138. This statute was passed as a result of strong pressure by lawyers. It was generally conceded that the Irving Trust Company had handled estates very efficiently. See note 133, *supra.*

139. § 2a(17). An earlier draft of the bill made provision for "registered" trustees, but apparently placed almost no restrictions on registration. H. R. 10382, 74th Cong., 2d Sess. (1936) § 45; (1936) 11 J. N. A. REF. BANKR. 23.

the initial selection of competent receivers and trustees. Instead it seeks to improve the existing system without altering its basic framework. An attempt is made to attract more capable officials by providing adequate compensation for trustees in small cases and for receivers and trustees in arrangements.[140] In the rare case when creditors are interested in an estate, the Chandler Bill facilitates their participation in administration by giving creditors' committees official standing to act in an advisory capacity and present to the court any question affecting the administration of the estate.[141] To provide for the more usual situation where creditors are unconcerned, the Bill makes a feeble effort to curb the evil of solicitation. Fee splitting is made sufficient ground for removal or dismissal, and for withholding of compensation.[142] Claims of $50 or less are to be counted in amount but not in number.[143]

The administrative personnel could be improved further by insuring the retention of more competent referees. If all referees were placed as far as is possible upon a full time basis, a more efficient referee's organization could be set up and more capable men attracted to the position by hope of a respectable income.[144] While the policy statement in the Chandler Bill that referees shall be employed if possible on a full-time basis[145] seems little more than a pious hope, it is perhaps politically impracticable to cut down their number immediately. The Bill soundly provides for more permanent tenure by lengthening the term of referees from two to six years.[146] Unfortunately,

140. § 48c(1); § 48f. Inadequate compensation has resulted in the delegation of administrative duties by receivers and trustees to lawyers. This practice has lowered the quality of administration and has resulted in large legal fees. DONOVAN, *op. cit. supra* note 2, at 2, 66; STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 37. The prevalence of high legal fees is also attributable to the formalities of bankruptcy procedure. DONOVAN, *supra*, at 17, 227; see p. 1201 *infra*.

141. § 44b; § 58a. *Cf.* DONOVAN, *op. cit. supra* note 2, at 5, 31, 154–55; Billig, *supra* note 51, 78 U. OF PA. L. REV. 319.

142. § 48e.

143. § 56c. For a discussion of the much more elaborate proxy safeguards employed in England, see DONOVAN, *op. cit. supra* note 2, at 29–30. At the present time the Standing Bankruptcy Rules Committee in the Southern District of New York is investigating to see if the rules relating to solicitation of proxies can be strengthened. Disciplinary proceedings are also contemplated. Communication to the YALE LAW JOURNAL from Judge John C. Knox, Jan. 15, 1937.

The bill provides that the attorney for the petitioning creditors shall not be disqualified from acting as attorney for the receiver or trustee [§ 44c], a practice prohibited in some districts in order to curb solicitation by attorneys. The draftsmen of the bill felt that it was unwise to forbid the retention of the one most familiar with the estate. Their decision is probably justified, since any rule of this sort can be circumvented by the collusion of two attorneys. For a discussion of this problem, see DONOVAN, *op. cit. supra* note 2, at 99–102; Clark, *supra* note 129, at 1211–12 (the problem should be left to local rules).

144. STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 27, 123.

145. § 37a.

146. § 34a. All newly appointed referees are required to be lawyers. § 35a(5). Where a referee's office is exclusively used for his official duties, the bill permits him

the present fee system of compensation is retained, although, to take care of isolated abuses it is provided that a judge may fix a maximum remuneration for a referee in general, and in a particular case.[147] The salary system would seem superior to the fee system because the possibility of abuse through referees rendering reviewable decisions affecting their compensation appears greater than the benefits which may accrue to estates through the inducement that a fee system offers to secure the greatest net return and to wind up cases quickly.[148]

If the present method of selecting administrators is retained, supervision of their actions should be withdrawn from the courts and entrusted elsewhere. Although it is fruitless and wasteful to place the administration of an estate under minute surveillance, the general conduct of receivers and trustees should be subjected to scrutiny by a central bankruptcy supervisor and regional assistants. These administrators would supervise receivers, trustees, and referees, investigate abuses and hear creditors' complaints, recommend uniform practices and standard schedules of fees for certain services, and prepare statistics.[149] But the Chandler Bill in this respect merely requires that the attorney general gather more adequate statistics than he does at present.[150]

Even if efficient administrators are appointed, experience has demonstrated that the procedural restrictions of the Act make business-like administration a difficult matter. The Bankruptcy Act, designed in a time of slow communication for the administration of large estates, provides an elaborate and legalistic system of court and creditor supervision over the actions of receivers and trustees. Though judges and creditors usually approve perfunctorily or ignore entirely those administrative actions which are submitted to them for ratification, regulatory rules of court, designed to provide for closer supervision over incompetent and dishonest receivers and trustees, have been added to these statutory technicalities.[151] The restrictions, unnecessary when competent officers are appointed, do not prevent abuses by dishonest and in-

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to charge the cost of equipment as an expense. § 62a. This provision will allow the adequate equipment of an office for the business of a court.

147. § 40a.

148. STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 30.

149. DONOVAN, *op. cit. supra* note 2, at 26. The Inspector-General in Bankruptcy in England, and the Superintendent of Bankruptcy in Canada perform these functions. *Id.* at 179; (1936) 11 J. N. A. REF. BANKR. 24. Such supervisors would also be needed to control licenses under a system of licensed or official administrators.

150. § 53a. As to the inadequacy of the statistical reports, see Douglas and Marshall, *supra* note 51, at 25, n. 2; *Joint Hearings, supra* note 11, at 619. Since these complaints were voiced, even less information has been published in the reports of the attorney-general. Compare REPS. ATT'Y GEN. with BANKR. REPS. BOARD OF TRADE (England) and REPS. SUPER. IN BANKR. (Canada).

151. STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 37; DONOVAN, *op. cit. supra* note 2, at 4. See *e. g.*, General Order 44, requiring a receiver or trustee to obtain permission from the judge to appoint an attorney.

efficient officials, but only succeed in making the retention of attorneys necessary and in slowing up administration considerably. And dilatory administration makes for large maintenance expenses in commercial cases.[152]

The Chandler Bill seeks to expedite administration in part by clothing administrators with greater powers. Referees are given jurisdiction to grant discharges and to confirm arrangements or wage earner plans, subject, of course, to review.[153] Proceedings may be referred to the referee before as well as after adjudication.[154] The referee is given the power—one formerly reserved to the judge—to declare dividends at more frequent intervals than those set in the Act.[155] But even though the extended jurisdiction of referees will reduce the work of judges, it might be advisable to provide, at least in the large metropolitan areas, that one judge, or more if necessary, be assigned to handle all appeals in bankruptcy.[156] A number of trials could be eliminated by the submission of all disputes to the judge in chambers.[157] And the time of trustees and receivers might be expended on more useful pursuits by dispensing with the necessity of court approval of recurring administrative acts.[158]

The Bill also seeks to speed administration by reducing superfluous procedural details. Schedules, or at least a list of creditors, must now be filed with a voluntary petition; in involuntary proceedings the time for filing is cut from ten to five days.[159] Some notices to creditors are eliminated.[160] The provision whereby any notice may be waived can be used to accelerate administration, since several of the required notices need only be given to the creditors' committee where one has been appointed.[161] The provisions regarding ancillary administration are simplified.[162] Early discharge of the trustee is facilitat-

152. Liquidation is much speedier in Canada than in the United States. DONOVAN, *op. cit. supra* note 2, at 162.

153. § 38a(4), (5). See *Joint Hearings, supra* note 11, at 533, 606.

154. § 22a.

155. § 65b. *Cf. Joint Hearings, supra* note 11, at 724.

156. This procedure is followed in Canada and England. DONOVAN, *op. cit. supra* note 2, at 174. Such a measure would probably not be necessary in the Southern District of New York, since the volume of business is so large that each judge is a specialist in bankruptcy affairs. Communication to the YALE LAW JOURNAL from Judge John C. Knox of the Southern District of New York, Jan. 15, 1937. A more fundamental suggestion for improvement is that referees be given the powers of bankruptcy courts and that appeals be taken directly to the circuit court of appeals. See McLaughlin, *supra* note 6, at 374.

157. This practice is followed in Canada. DONOVAN, *op. cit. supra* note 2, at 168.

158. *E.g.*, the requirement of court approval of compromise agreements made by the receiver or trustee [§ 27a] might be eliminated. *Joint Hearings, supra* note 11, at 694.

159. § 7a(8).

160. § 58. Compare the recommendations made in DONOVAN, *op. cit. supra* note 2, at 32.

161. § 58. See DONOVAN, *op. cit. supra* note 2, at 6-7.

162. § 2a(20); § 69d. *Cf. Joint Hearings, supra* note 11, at 533.

ed.[163] And while other minor procedural changes might have been made to expedite administration, at least the time for filing claims should have been reduced from six to three months or a shorter period.[164]

These suggestions for improving personnel and expediting administration should certainly be adopted in small cases. Even before Section 77B drew the bulk of large cases away from general bankruptcy administration,[165] assets were less than $5,000 in 95% of the cases.[166] The elaborate machinery, designed for large bankruptcies, is certainly useless in small cases, particularly wage earner cases, where bankruptcy must fail because the debtor's assets are usually tied up by conditional sales contracts or by exemptions.[167]

The Chandler Bill makes a gesture toward summary administration by providing that a no-asset case may be closed without a final meeting of creditors.[168] A more fundamental measure would reduce administrative details to a minimum by following the English practice of requiring the appointment of an official liquidator in all cases under a certain size.[169] One notice to all creditors of the pendency of a proceeding would suffice except where other notices of important steps are requested, and the employment of lawyers would thus be unnecessary. The only purpose of small debtor proceedings is the granting of a discharge, and while discharge applications can be thoroughly investigated, if necessary,[170] these cases can be wound up in a short time. Legislation providing for summary administration of small cases brought into bankruptcy could be supplemented with provisions exempting from bankruptcy all wage earners who earn up to $5,000 and all persons whose debts are less than $2,000, since dividends are rarely realized from such estates.[171] The right of these persons to invoke voluntary proceedings would of course be preserved.

While realization on assets can be increased substantially only by appointment of more efficient administrators,[172] several sections of the Chandler Bill

163. § 66a.

164. *Cf.* STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 131. For other suggestions to expedite administration, see *id.* at 125; DONOVAN, *op. cit. supra* note 2, at 24, 110–125; Clark, *supra* note 129, at 1198, 1212–13; *Joint Hearings, supra* note 11, at 693; (1932) 7 J. N. A. REF. BANKR. 19. The bill also cuts down expenses in a few minor details. See, *e.g.*, § 70f (number of appraisers reduced).

165. Communication from Judge John C. Knox to the YALE LAW JOURNAL, Jan. 15, 1937.

166. STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 8.

167. Douglas, *supra* note 72, at 626. See also (1936) 11 J. N. A. REF. BANKR. 32, 36, 43.

168. § 55e. The draftsmen refused to adopt a proposal that discharges be disposed of at the first meeting of creditors where no basis of objection appeared and no objection was contemplated. It was thought that information which would bar a discharge is often discovered at a later date.

169. DONOVAN, *op. cit. supra* note 2, at 176; Douglas and Marshall, *supra* note 51, at 56. In England, 80% of all cases are so administered. DONOVAN, *loc. cit. supra.*

170. See *infra* p. 1206 as to the desirability of such investigation.

171. *Joint Hearings, supra* note 11, at 741.

172. *Cf.* DONOVAN, *op. cit. supra* note 2, at 193.

aim to reach the same result on a smaller scale. Provision is made for the liquidation of dower to allow advantageous sales,[173] for increasing the efficiency of turnover proceedings,[174] and for the filing of a notice of bankruptcy in the county where a bankrupt's real estate is situated,[175] thus guarding against disposal of realty to a bona fide purchaser.

Although it may be doubted whether the amount expended in attempted recovery of property preferentially transferred by the debtor is equal to the value of the property actually recovered,[176] the Chandler Bill appears on sound ground in attempting to strengthen the preference provisions.[177] Since the critical period is longer than four months,[178] it would seem advisable to lengthen the preference period and to provide that any transfer or debt contracted within that period is prima facie preferential.[179] It might be prudent to provide for the appointment of an official auditor to aid in discovering preferences and for an inventory at the beginning of each case. Larger dividends can also be realized by giving the trustee more adequate remedies. While the Chandler Bill vests bankruptcy courts with summary jurisdiction in proceedings to set aside a preferential lien,[180] and requires an assignee or receiver to account,[181] summary jurisdiction or even plenary jurisdiction might have been given to bankruptcy courts in a wider area.[182] Provision for summary judgments against debtors of the estate who admit their obligations, moreover, would assist in the collection of accounts receivable.[183] On the other hand, in order to guard against indiscriminate seizure in involuntary proceedings of the property of a debtor who may never be adjudicated, the Chandler Bill retains the oft-disregarded provision that a receiver be appoint-

173. § 2a(7).

174. § 21 l; § 7a(11).

175. § 21g.

176. Kreft, *What is the "Subject of Bankruptcies?"* (1932) 6 TEMP. L. Q. 141, 160.

177. For a discussion of important amendments to the preference and fraudulent conveyance sections, see McLaughlin, *supra* note 6, at 374, 384.

178. Fürth, *supra* note 8, at 859.

179. Deutsch, *The Bankruptcy Law and Practice* (1928) 12 MINN. L. REV. 311, 317. The English Act voids gifts made within 10 years before bankruptcy if the debtor was unable to pay all his debts at the time of the gift. (1900) 109 L. T. 119. See also, DONOVAN, *op. cit. supra* note 2, at 156 (claims of close relatives subordinated).

180. §67a(4).

181. § 2(21).

182. See Committee Print, *supra* note 6, at 134; *Joint Hearings, supra* note 11, at 608, 609, 610; Hunt, *National Bankruptcy Legislation—Past, Present and Future* (1933) 38 COMM. L. J. 630, 639.

183. STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 133. But *cf. Joint Hearings, supra* note 11, at 688. It has been further suggested that the provision [carried in the act of 1800] of an allowance of support out of the estate to the debtor during liquidation would assist in greater realization, since the debtor, freed from the necessity of attempting to earn a living during liquidation, would be more willing and able to cooperate. Indeed, it is said that such a provision would decrease fraudulent bankruptcies by making it unnecessary for the debtor to put something aside in order to support himself. Hunt, *supra* note 182, at 641.

ed only where necessary.[184] In large cities, at least, a receiver must be appointed in every case, because of the danger that the estate will be eaten up by rent, watchmen service, insurance and other expenses, or that the debtor will dissipate his estate unless the assets are disposed of before the election of a trustee.[185]

Dividends to general creditors can also be increased by more even distribution of total dividends, for the priorities allowed various groups of creditors consume a large proportion of assets realized.[186] The Chandler Bill limits priorities to those mentioned in the Bankruptcy Act by eliminating the provision allowing priorities established by states, except rent for the three months preceding bankruptcy.[187] Since many leases contain acceleration clauses, a disproportionate amount of assets is often consumed, especially in small cases, by rent claims.[188]

It has been thought also that if discharges were denied more frequently, future earnings would be made available to creditors and realization thereby increased. While the indiscriminate granting of discharges has been attributed in large part to inadequacy of investigation and lack of opposition, matters left to creditor initiative, discharges have probably been given freely because of the few grounds upon which they can be denied.[189] The Chandler Bill seeks to insure adequate examination of a debtor by providing for compulsory examination,[190] for the filing of a statement of affairs,[191] and for investigations by the United States attorney upon court request; it guarantees oppo-

184. § 2a(3).

185. Clark, *supra* note 129, at 1196.

186. Hunt, *supra* note 182, at 641. A large proportion of assets are of course consumed by exemptions. Various suggestions have been advanced to supersede the present system of leaving exemptions to state control. § 6a. Poteat, *Debtors' Exemptions—A Study in Credit Administration* (Unpublished thesis in Yale Law School Library, 1933), 49 (system of joint federal-state control); *Joint Hearings, supra* note 11, at 270 (maximum limitation on state exemptions); Siegel, *Suggestions for the Improvement of the Bankruptcy System* (1924) 1 AM. BANKR. REV. 69 (federal control of exemptions). It would seem wise to retain large exemptions if debtors are to be given proper relief. See p. 1210 *infra*. For a discussion of the homestead exemptions, see Comment (1937) 46 YALE L. J. 1023. The exemption statutes are collected in C. C. H. BANKR. SERV. ¶ 7101.

187. § 64a(5). See also § 67c, making a similar provision with respect to liens and guarding against thwarting of the priorities set up in the act by state statutes making certain claims liens.

188. Even in the absence of priorities, claims for future rent generally constituted such a large proportion of total liabilities that they were originally not provable. A recent amendment made them provable for one year. § 63a(7). The Chandler Bill re-enacts this provision but supplements it with a provision making rent claims fully dischargeable. § 17a. See Comment (1932) 41 YALE L. J. 894.

189. STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 3. Discharges are granted to 98% of applicants in mercantile cases and to 99½% in non-mercantile cases. *Id.* at 12. For a history of discharge provisions, see *id.* at 11; articles cited *supra* note 2.

190. § 55b. See STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 93.

191. § 7a(9).

sition when warranted by vesting the trustee and the United States attorney with power to contest a discharge without creditor consent, and by providing that adjudication operate as an automatic application for discharge.[192] These changes will have no serious effect and the Bill does not adopt the oft-advanced suggestions that provision be made for suspending discharge and for broadening the grounds on which discharges must be denied.[193]

The policy of the Chandler Bill toward discharge appears sound since experience has shown that severe discharge and examination provisions do not achieve their stated aims: the exclusion of bankrupts from trade, the prevention of failure by discouraging extravagance and dishonesty, and the increasing of dividends to creditors in a particular case.[194] Certainly the threat of a denied discharge would seem no more likely to prevent failure than the danger of imprisonment for debt; for the assumption that a potential bankrupt carefully weighs the possibilities of success against the penalties of failure before making a contemplated move and will take longer chances if a discharge can be easily obtained, is at best of questionable validity.[195] And although somewhat bothersome to a wage earner, denial of a discharge is little more than an inconvenience to a business man since he may return to business by incorporating or by acting in the name of a dummy.[196] Since the only benefit to be gained from tighter discharge is a speculative slight increase in dividends in wage earner cases, it seems undesirable to adopt measures whose only effect would be to reduce the standard of living of wage earners, and to lower the morale of other debtors by forcing them to circumvent a denied discharge.[197]

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192. § 14. The last provision will also guard against inadvertent omission to apply for a discharge. In many cases discharges are not applied for because of ignorance of the necessity for an application. STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 204.

193. STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 96; Douglas and Marshall, *supra* note 51, at 31 *et seq.*; Radin, *Discharge in Bankruptcy* (1931) 9 N. Y. U. L. Q. REV. 39. The Chandler Bill provides that confirmation of an arrangement within 6 years, as well as a previous discharge, is a bar to obtaining a discharge [§ 14c(5)], and that title to property vested in the bankrupt by inheritance within six months after bankruptcy is given to the trustee. § 70a(7).

194. The aims of a rigorous discharge provision have never been clearly formulated. See *Joint Hearings, supra* note 11, at 668: "Personally I believe we ought to jail some of these bankrupts, because I think they are like thugs . . . we do not punish them enough."

195. Compare the theory of punishment as a deterrent to crime. Von Hurtig, *Punishment* (1934) 5 ENCYC. SOC. SCIENCES 712. See also Radin, *supra* note 193, at 43. See Radin, *Debt* (1934) 5 ENCYC. SOC. SCIENCES 32. And see the figures as to the percentage of "repeaters" in England and the United States in Douglas, *Some Functional Aspects of Bankruptcy* (1932) 41 YALE L. J. 329, 361.

196. See *Joint Hearings, supra* note 11, at 618. No effective check on these practices has been adopted in England. Communication to the YALE LAW JOURNAL from the Inspector-General in Bankruptcy, March 1, 1937.

197. There are about 80,000 undischarged bankrupts in England. See Noel, *The Bankruptcy Law as it Affects Credit* (1925) 13 GEORGETOWN L. J. 131, 140. The original

Conclusion. Even if the Chandler Bill accomplished all the objectives of its sponsors, it would still leave virtually untouched the problem of preventing insolvencies[198]—a problem intensified by the recent addition, with the development of mass credit to implement a system of mass production, of a host of consumer insolvencies to the already vast number of business failures.[199] Failure results from the operation or interaction of two broad causes: an improper extension of credit when it was reasonable to foresee that the credit advance could not be repaid; and the impact of "accidental" factors not reasonably predictable at the time of credit extension.[200] To remove these causes measures more fundamental than amendments to the Bankruptcy Act are necessary.

An attempt may be made to curb improper credit extension by wider dissemination of credit information through increased creditor cooperation or governmental regulation.[201] These efforts do not promise significant success, however, because in a competitive system creditors can not be induced to extend credit only when warranted,[202] even if the added legislative sanction of priority in collection and bankruptcy proceedings according to the date of extension of credit is imposed,[203] or if collection remedies are otherwise curtailed. To limit failures effectively inferior credit risks must be eliminated so that credit granting, even if indiscriminate, will be made safer.

While some poor risks can be taken care of by education and creditor or governmental supervision,[204] the bulk of inferior risks can only be weeded

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policy of discharge, in part at least, was to encourage business expansion. Douglas, *supra* note 2, at 449.

198. Sturges and Cooper, *supra* note 72, at 496, 497.

199. From 1920–1930 wage earner bankruptcies increased 414% while the population increased 16%. CAUSES OF BANKRUPTCY AMONG CONSUMERS, *op. cit. supra* note 72, at 1. See Symposium on Instalment Credit in (1935) 2 LAW & CONTEMP. PROB. 139; references cited in Nehemkis, *supra* note 94, at 561, n. 1.

200. For discussion of the causes of bankruptcy, see CAUSES OF BANKRUPTCY AMONG CONSUMERS, *loc. cit. supra* note 72; DEP'T OF COMMERCE, CAUSES OF COMMERCIAL BANKRUPTCIES, (Dom. Commerce Series, No. 69) (1932); DEP'T OF COMMERCE, CAUSES OF BUSINESS FAILURES AND BANKRUPTCIES OF INDIVIDUALS IN NEW JERSEY IN 1929-30 (Dom. Commerce Series, No. 54) (1931); Cover, *loc. cit. supra* note 42; Douglas, *Some Functional Aspects of Bankruptcy* (1932) 41 YALE L. J. 329.

201. For various suggestions, see (1924) 1 AM. BANKR. REV. 179; (1925) 2 AM. BANKR. REV. 136.

202. See, *e.g.*, N. Y. Times, Dec. 14, 1936, p. 2, col. 2: "They (retail druggists) were informed by their president, George Gottesman, that close to 70% of their number were actually insolvent and were staying in business only on the sufferance of drug manufacturers and wholesalers." See also, CAUSES OF COMMERCIAL BANKRUPTCIES, *supra* note 200, at 6.

203. See Sturges, *A Proposed State Collection Act* (1934) 43 YALE L. J. 1055. The scheme suggested seems worth adopting for whatever effect it may have on the prevention of failure, since the system of distribution proposed is decidedly more equitable than the present method.

204. As a result of the suggestions made by the Department of Commerce after a survey of Louisville grocers, failure among that group was reduced considerably.

out by limiting entry into business to those who are both efficient and adequately capitalized[205] and by licensing consumption credit — measures which, even if enforceable, are accompanied by consequences in social stratification and consumption limitation, so undesirable as to overbalance the possible monetary saving that their adoption might effect. Failures which result from improper credit extension, moreover, can probably never be completely wiped out in a competitive economy; for even "efficient" businesses must fail in such a system, and goods must be sold to some who are unable to pay in a system of unplanned production.[206]

Though the immediate social and economic effect of failure on debtor, creditor and consumer is often disastrous,[207] it may be questioned whether it is sound social policy to make any attempt to cut down those failures which result from improper credit extension. Since credit can be extended more discriminatingly only at the risk of refusing credit to a large proportion of non-delinquent consumers along with the delinquent, it will be difficult, even under a centrally controlled system of credit, to approach closer to the point where credit policies make for a maximum excess of saving in production costs over bad debt losses.[208] And if the possibilities of monetary gain are so slight, it

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Sadd, *Department of Commerce Studies the Causes of Business Failures* (1931) 5 J. N. A. REF. BANKR. 135. As to creditor cooperation, see Cover, *supra* note 42, at 97.

205. *Cf.* King, *Salient Features of the Bankruptcy Laws of Other Countries* (1931) 9 J. N. A. REF. BANKR. 75, 78. More failures result from inefficient business methods and practices than from any other cause. CAUSES OF BUSINESS FAILURE AND BANKRUPTCIES OF INDIVIDUALS IN NEW JERSEY IN 1929-30, *supra* note 200, at 1.

206. See CAUSES OF COMMERCIAL BANKRUPTCY, *supra* note 200, at 6. Even under a system of planned production, estimates can never attain precise accuracy.

207. The repercussions of failure on debtor and creditor go deeper than immediate monetary losses. CAUSES OF BUSINESS FAILURE AND BANKRUPTCIES OF INDIVIDUALS IN NEW JERSEY IN 1929-30, *supra* note 200, at iv. To the insolvent, whether business man or wage earner, failure often results in loss of employment and an unbearable debt burden as well as lowered morale and broken social ties. CAUSES OF BANKRUPTCIES AMONG CONSUMERS, *supra* note 200, at 8. Cover, *Liquidation and Rehabilitation of the Consumer and Small Business* (1933) 36 SCIENTIFIC MONTHLY 444. To the creditor the failure of his customer may well sound his own business death knell. STRENGTHENING OF PROCEDURE, *op. cit. supra* note 2, at 9. To competitors of the debtor failure sometimes manifests itself in a demoralized market for their wares. CAUSES OF COMMERCIAL BANKRUPTCIES, *supra* note 200, at 9. The costs of failure are ultimately borne by the consumer. For varying estimates of their magnitude, see Radin, *supra* note 193, at 39; Davidson, *Impressions of the Proposed New Bankruptcy Law* (1932) 37 COMM. L. J. 241, 243; STRENGTHENING OF PROCEDURE, *supra* at 1.

208. To reach this optimum synchronization is the aim of every well-managed business, and not all businesses are so managed. See CAUSES OF BANKRUPTCIES AMONG CONSUMERS, *supra* note 72, at 11; see note 205, *supra*. For an estimate of the percentage bad debt losses form of total sales, see Coles, *The Bankruptcy Law and Its Amendment* (1931) 36 COMM. L. J. 317. Costs of collection must be added to any such figure. See SCHMALZ (1928) OPERATING STATISTICS FOR CREDIT AND ACCOUNTS RECEIVABLE DEPARTMENT OF RETAIL STORES in 1 MICH. BUS. STUDIES, No. 6 (1927).

would seem impolitic to risk disturbing a societal structure bound closely to the credit system; for the elimination of consumer insolvencies can be accomplished only at the cost of reducing production and thus adding more productive workers to the ranks of the unemployed—ranks which will be further swelled by the incompetent business men and their employees who are excluded from trade in order to reduce business failures.[209] It may be, moreover, that through the mechanism of failure capitalism provides support for those who would otherwise be unemployed or who are employed at inadequate wages. And while this crude device imposes the burden of support on those least able to bear it through what amounts to a gigantic sales tax, the proceeds of which are unscientifically distributed according to the whim of merchants and manufacturers, it may be necessary to tolerate failure until it becomes practicable by the adoption of more fundamental measures to place the burden on those best able to bear it, and to distribute the benefits more equitably.

Even when credit is extended only to those who would be regarded as good risks initially, circumstances which could not readily be foreseen may operate by increasing a debtor's expenses or decreasing his income to cause failures. Over some factors—automobile accident judgments, extraordinary medical expenses, unemployment, or excessive interest rates on loans incurred to tide over such emergencies—the debtor can exercise little influence; over others—speculation, gambling and dishonesty—his control is more direct. Some measures—compulsory insurance, socialized medicine, unemployment insurance, and governmental loans—aimed at eliminating or lessening the shock of the former eventualities, give more promise of at least a partial success than those—government control of real estate development and stock speculation and punishment of dishonesty—directed at limiting the impact of the latter forces.[210] Since elimination of these causes of failure involves coping with many of society's major problems, the effect of a suggested proposal in reducing insolvencies should not induce its adoption if it is otherwise undesirable. Nor is there any compelling force to the suggestions that the bankruptcy power be given to the states because they alone are able to deal with the social problems antecedent to bankruptcy,[211] since the solution of those problems in no way hinges on where the bankruptcy power resides.

Like other bankruptcy legislation the Chandler Bill must be judged, however, not by its effect in reducing failures, but by its success in cutting down

209. *Cf.* Radin, *supra* note 193, at 47. See Radin, *Debt* (1931) 5 ENCYC. SOC. SCIENCES 32, 38. Some of this group would probably be directly re-employed by those establishments which received the trade of the defunct businesses.

210. Cover, *supra* note 42, at 30. Douglas, *supra* note 72, *passim* and at 642; Hamilton, *In re The Small Debtor* (1933) 42 YALE L. J. 473. Attempts to solve these problems through use of the discharge provisions [Douglas, *loc. cit. supra* note 200; (1936) 13 N. Y. U. L. Q. REV. 440] are doomed to failure. See p. 1206 *supra*.

211. Douglas, *supra* note 72, at 638 *et seq.*

losses in other ways. The Bill ignores for the most part the possibility of increasing dividends through improving the standard bankruptcy machinery and concentrates on providing special proceedings which are expected to decrease credit losses by shortening the critical period, by realizing more on assets at a minimum expense and by tapping future earnings. Although the Chandler Bill is probably calculated to achieve these objectives in wage earner cases, it is doubtful whether it will be similarly successful in commercial cases unless the suggested provisions for strengthening the position of assignments and of common law compositions are adopted.[212]

The increased dividends that creditors will in all likelihood receive through the operation of the Chandler Bill, or at least those dividends obtained by resort to a wage earner's future earnings, may, however, be secured at too high a price in debtor suffering. And while the couching of fundamentally creditor measures in terms of debtor relief[213] does not in itself vitiate that relief, a debtor, if his problems are to be adequately cared for, must not only be discharged from his personal obligations and relieved from the stigma of bankruptcy[214] but must also be assisted as far as is constitutionally possible in retaining his home, his farm, or his business assets, even though they are subject to mortgages. In view of the role of failure in a competitive economy, the paramount purpose of the Bankruptcy Act should be to provide such thoroughgoing relief for debtors.

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212. The success of the bill and of the suggestions advanced in this respect will of course ultimately depend on whether these proceedings carry a lesser stigma than bankruptcy. See notes 125, 126 *supra* and note 214 *infra*.

213. A debtor-creditor dichotomy has its limitations. Legislation passed in the interest of creditors often results in debtor relief. Imprisonment for debt was abolished because it was uneconomic, not because it was inhumanitarian. See Noel, *supra* note 197, at 137. Discharge was adopted to induce debtors to turn over their assets, not for purposes of debtor relief. McLaughlin, *supra* note 3 at 352. For an intelligent discussion of the problem, see Poteat, *Debtors' Exemptions: A Study in Credit Administration* (Unpublished Manuscript in the Yale Law Library, 1933). The Chandler Bill seems to have been proposed primarily from the viewpoint of credit interests. See statement by W. Randolph Montgomery in (1935) 9 J. N. A. REF. BANKR. 64: "During the next session of Congress, I presume that the results of the Bankruptcy Conference will be introduced. I do not know that that is wise at the present time. Personally I am fearful of the debtor psychology that is abroad at the present time."

214. See *Joint Hearings, supra* note 11, at 893.